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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

CITY OF FONTANA et al.,

Plaintiffs and Respondents,

v.

KEELY M. BOSLER, AS DIRECTOR, ETC.,

Defendant and Appellant;

TEN-NINETY LTD. et al.,

Real Parties in Interest and Respondents.

C083058

(Super. Ct. No.
34201580002138CUWMGDS)

TEN-NINETY LTD.,

Plaintiff and Respondent,

v.

KEELY BOSLER, AS DIRECTOR, ETC.,

Defendant and Appellant;

CITY OF FONTANA et al.,

Real Parties in Interest and Respondents.

C083081

(Super. Ct. No.
34201580002139CUWMGDS)

These consolidated appeals -- and a related but separate appeal in a separate lawsuit by Libreria Del Pueblo and Virginia Macy (C079527) -- involve the 2011 Dissolution Law (Health & Saf. Code, §§ 34161-34191.6; statutory section references that follow are to the Health and Safety Code unless otherwise stated) which dissolved redevelopment agencies (RDAs). The legislation sought to stop abuses by cities and counties creating RDAs that took property taxes away from other local agencies such as schools, police and fire protection services, and contributed to a budget crisis. (§ 34167, subd. (a), 34171; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 250 (*Matosantos I*); *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1463-1467 (*Pasadena*).)

At issue is a 1992 Third Amended and Composite Owner Participation Agreement (OPA) and incorporated Facilitation Agreement (FA) between the City of Fontana, the RDA created by the City, and private developer Ten-Ninety, Ltd., for a massive, mixed-use Jurupa Hills Redevelopment Project that began in 1982. The OPA/FA are due to expire in 2032-2033, though some provisions purport to continue thereafter.

The 1992 OPA promises 100 percent of property tax “increment” (tax increase attributable to redevelopment) to the developer for its development costs, yet funnels 35 percent (35%) of it from the RDA, through Ten-Ninety, to the City and its former RDA -- now to the City as a municipality and the City as RDA’s Successor Agency (SA) (§ 34173(g) [SA is separate entity from City as municipality]).

The OPA obligates Ten-Ninety to pay 35% as settlement payments to resolve disputes with the City/RDA in “satisfaction of negative fiscal impacts” of Southridge Village (residential development) within the Jurupa Hills Redevelopment Project. Yet the OPA also treats Ten-Ninety’s “settlement payments” as loans to the City, which the former RDA (now SA) must repay to Ten-Ninety plus 15.5 percent interest (the “add-back provision”), regardless whether any claims against Ten-Ninety were made or paid. Although the SA itself initially reported the debt it owed to Ten-Ninety as \$1.5 billion,

the City, SA, and Ten-Ninety now claim that the real yield is only \$313 million and that the 35% add-back was never really going to be repaid to Ten-Ninety anyway. Evidence indicates the City uses the 35% payments from Ten-Ninety to pay for ongoing public services such as police and fire protection.

The California Department of Finance (DOF), pursuant to its statutory authority (§§ 34177, subd. (l)-(o), 34179.6), determined that the 2011 Dissolution Law renders unenforceable the 35% provisions.

The City/SA and Ten-Ninety filed petitions for writ of mandate and complaints for declaratory and injunctive relief, challenging DOF's determination. They claim a 1992 validation judgment (§ 33501; Code Civ. Proc., § 860 et seq.) by a San Bernardino County Superior Court, validating the 1992 OPA/FA, is binding and conclusive and therefore precludes application of the 2011 Dissolution Law. Ten-Ninety and the City/SA also claim the 35% provisions constitute an enforceable obligation under the Dissolution Law, and the 35% payments cannot be severed from the entire redevelopment agreement without unconstitutionally impairing contractual rights of private party Ten-Ninety. They argue that, if the add-back provision is invalid, then Ten-Ninety should keep 100 percent of the tax revenues.

The trial court concluded that the 1992 validation judgment precludes application of the 2011 Dissolution Law but, even if it did not, the OPA/FA is enforceable. The court entered a joint judgment against DOF. Defendant Keely Bosler, Director of DOF, appeals. San Bernardino County's Auditor-Controller, Oscar Valdez, is named as a real party in interest. The City and Ten-Ninety are real parties in interest in each other's case.

DOF filed a notice in this court on December 23, 2016, advising that a partial resolution had been reached between DOF and Ten-Ninety regarding other issues. DOF agreed that the automatic stay on appeal be lifted as to 65 percent of tax increment so that such monies could continue to be paid to Ten-Ninety. In these consolidated appeals, DOF argues only that the 35% provisions should be invalidated *prospectively* as an

unlawful sponsor agreement and going forward the 35% should instead be distributed to the other local taxing agencies.

A related but separate appeal in a separate lawsuit by Libreria Del Pueblo and Virginia Macy (C079527) is pending, involving the same underlying facts but predating DOF's determination.

We conclude the 35% provisions constitute an unenforceable sponsor agreement funneled through the developer, rendered unenforceable by the 2011 Dissolution Law despite the 1992 validation judgment, and those provisions are severable from the OPA without unconstitutional impairment of private party Ten-Ninety's contractual rights. For the remainder of the OPA term, the 35% of tax revenues shall instead be distributed to other local taxing agencies as directed by law. Accordingly, we reverse the trial court's judgment with respect to the 35% provisions. We affirm, however, the judgment insofar as it rules that "The [SA's] payment obligations to Ten-Ninety under the OPA will terminate at the close of Fiscal Year 2032-2033."

We deny DOF's request in its opening brief on appeal that we take judicial notice of court dockets in related cases.

LEGAL BACKGROUND

Before 2011, the Community Redevelopment Law or CRL (§ 33000 et seq.) authorized cities and counties to establish RDAs to revitalize blighted communities. (*Matosantos I, supra*, 53 Cal.4th at p. 246.) RDAs had no power to tax but instead relied on "tax increment financing" under the CRL. (Cal. Const., art. XVI, § 16; Health & Saf. Code, § 33670.) If, as expected, redevelopment increased property values, the taxes on that increment were assigned to a special fund from which the RDA retired any bonds it issued to raise funds for the project. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865-866.) In effect, the redevelopment project paid for itself. (*Id.* at pp. 865-866; see also, *Matosantos I, supra*, 53 Cal.4th at pp. 246-247.) The CRL

mandated that redevelopment plans provide for affordable housing for persons of low- and moderate-income. (§§ 33334.2-33334.6.)

The legislative dissolution of redevelopment agencies has been well-documented in our prior decisions. (§§ 34161 et seq. [freeze on activities]; 34170 et seq. [dissolution]; *City of Grass Valley v. Cohen* (2017) 17 Cal.App.5th 567, 573-574 (*Grass Valley*).) “Over the years, ‘a perception had grown that some [RDAs] were used as shams to divert property tax revenues that otherwise would fund general local governmental services’ ” (*Cuenca v. Cohen* (2017) 8 Cal.App.5th 200, 210 (*Cuenca*).) RDAs entered agreements with their “sponsor[] entities” and staffed the RDA boards with officials of the sponsoring entity. (§ 34171, subd. (n); *City of Tracy v. Cohen* (2016) 3 Cal.App.5th 852, 855 (*Tracy*).) These “sponsor[] agreements” locked up an ever-increasing share of local property taxes. (*Tracy*, at p. 855.)

The City of Fontana was particularly prolific, as noted in a document of which the trial court took judicial notice, i.e., the January 18, 2011, Legislative Analyst’s Office (LAO) Report on the Governor’s Redevelopment Proposal, pages 1-2. The LAO Report said: “The City of Fontana’s redevelopment agency receives more than two-thirds of property taxes paid in the city.” (*Id.* at p. 2.) This is property tax revenue that is shifted away from schools and other local agencies. (*Id.* at p. 1.) This compared to a 12 percent statewide average, 31 percent in San Bernardino County (where Fontana is located), and five percent in Sacramento County. (*Ibid.*) (<https://perma.cc/WG7R-HBBX> [as of July 2, 2019].)

The Dissolution Law rendered generally inoperative the CRL provisions about “tax increment” (§§ 34177, subd. (d), 34189; *Cuenca, supra*, 8 Cal.App.5th at p. 207, citing Assem. Bill No. 26 (2011-2012 1st Ex. Sess.)) but did not erase all obligations already created by RDAs. (*Cuenca*, at p. 207, citing § 34171, subd. (d).) Under the oversight of DOF, ongoing obligations -- if deemed “enforceable obligations” under the new law -- could continue to be paid by Successor Agencies (SAs) charged with winding

down RDA affairs, using monies from the Redevelopment Property Tax Trust Fund (RPTTF) administered by the county auditor/controller. (§§ 34182, 34173, subd. (g), 34175, subd. (a), 34177, subds. (a), (h), (k); *Matosantos I, supra*, 53 Cal.4th at pp. 251, 262-263.) The SA submits to its oversight board for approval, periodic Recognized Obligation Payment Schedules (ROPS's) listing "enforceable obligations." (§§ 34173, 34182, subd. (c)(1)-(2); 34183, subd. (a), 34187.) The DOF then determines whether each item is an "enforceable obligation" under the Dissolution Law and has authority to eliminate or modify any items on a ROPS. (§§ 34177, 34179.) The remainder of the RPTTF is distributed to other taxing entities. (§§ 34183, subd. (a)(4), 34187, 34188.) When the SA's enforceable obligations are retired, the SA is dissolved. (§ 34187, subd. (b).)

The statutory definition of "enforceable obligations" includes some contracts but expressly excludes sponsor agreements between former RDAs and the cities that had created them. (§§ 34171, subd. (d)(2) [" 'enforceable obligation' does not include any agreements, contracts, or arrangements between the city . . . that created the [RDA] and the former [RDA]"]; § 34177, subd. (a); *City of Brentwood* (2015) 237 Cal.App.4th 488, 494 (*Brentwood*).) "[T]he Legislature could well recognize that because of the conjoined nature of the governing boards of redevelopment agencies and their community sponsors, such obligations often were not the product of arm's-length transactions." (*Matosantos I, supra*, 53 Cal.4th at p. 258, fn. 12.) Also excluded from the definition of "enforceable obligations" are agreements that are "void as violating the debt limit or public policy." (§ 34171, subd. (d)(1)(E).)

"Sponsor entities or successor agencies may seek judicial review when [DOF] disapproves the inclusion of items proposed as enforceable obligations in the periodically filed recognized obligation payment schedules (ROPS). [Citations.]" (*Grass Valley, supra*, 17 Cal.App.5th at pp. 574-575.)

Effective June 2012, any action contesting any determinations made under the Dissolution Law must be filed in Sacramento County. (§ 34189.3.)

FACTS AND PROCEEDINGS

Initial OPAs

Beginning in 1982, RDA and Ten-Ninety's predecessor in interest (Southridge Village Partners) entered into a series of complex contracts for the Jurupa Hills Redevelopment Project, a large-scale mixed-use plan adopted by the City Council in 1981, with support from entities such as school districts, that included residential and commercial development as well as building public infrastructure such as roads, sewers, schools, and police and fire facilities. The developer agreed to provide capital and construct infrastructure and then transfer title to the RDA, and RDA agreed to pay all tax increment to the developer for its "Development Costs" plus 10 percent interest, from tax increment revenues generated by the Project (the "OPA Debt"). The developer ultimately invested in the vicinity of \$200 million.

The RDA filed a petition against "All Interested Parties" to "validate" the OPA under Code of Civil Procedure section 860 et seq. No one objected, and the San Bernardino Superior Court entered a default validation judgment.

In 1984, the parties amended the OPA to, among other things, add overhead and management fees and increase the interest rate on the OPA Debt to 15.5 percent. The San Bernardino County Superior Court granted another validation judgment by default.

In 1987, the parties amended the OPA a second time, increasing the bonded indebtedness limit from \$50 million to \$135 million. The RDA pledged all tax increment to Ten-Ninety, with no set-aside for low- or moderate-income housing as required by the CRL. (See *Fontana Redevelopment Agency v. Torres* (2007) 153 Cal.App.4th 902, 906 (*Torres* or *Fontana I.*)) The Second Amended OPA obligated Ten-Ninety to make three \$600,000 payments to the City to satisfy any obligations for infrastructure maintenance,

“adverse financial effects on the operation and maintenance activities of the City resulting from increased municipal demands required within the Project Area as a result of the Development of Southridge Village,” and any existing or future City deficits relating to Southridge Village. Again, the local superior court entered a validation judgment by default.

1992 Third Amended OPA and Validation Judgment

In 1992, a Third Amended and Composite OPA added the City as a party, incorporated by reference a concurrently-executed Facilitation Agreement (FA), and expressly provided that the OPA/FA was to become effective on the date of finality of a new validation judgment. Unless otherwise specified, our reference to “OPA” refers to the Third Amended OPA. The OPA acknowledges that Ten-Ninety “has completed its Infrastructure obligations relating to the Development of Southridge Village.” The OPA defines “infrastructure items” as referring to “non-residential, non-commercial and non-industrial land uses” such as flood control, sewers, public streets, school facilities, police and fire protection facilities, parks, etc. In section 2.3(f)(ii) of the OPA, Ten-Ninety agreed to pay Colton Unified School District approximately \$700,000 pursuant to Ten-Ninety’s obligations under “Colton School Agreements.”

The OPA/FA pledges all tax increment to Ten-Ninety but requires Ten-Ninety to pay 35% of that amount *to the City and RDA*, through a “fiscal agent,” ostensibly to settle disputes about “negative fiscal impacts” of the Southridge Village (residential) development within the project area. These “35% payments” are sometimes referenced as the “Participating Owner’s Payment Obligation (POPO)” or “Settlement Payments.” Ten-Ninety refers to them as “Settlement Payments.” Under section 2.3(a) of the Third Amendment, Ten-Ninety agrees to give the City and the RDA 35% of the “Residual Tax Revenue” allocated and payable to Ten-Ninety for the duration of the plan, i.e., until 2032-2033, “and 50% . . . thereafter,” suggesting maybe the agreement does not end in

2032-2033. “Residual Tax Revenues” are defined in section 1.16 of the Third Amended OPA as all tax revenues (defined as tax increment revenue in section 1.2 of the Third Amended OPA), plus other items.

As between the City and the RDA, the Third Amendment provides that the 35% amount received shall be divided “(1) first, to the Agency, amounts needed by the Agency for payment of its operating, overhead and administrative expenses in connection with the Development of Southridge Village; and (2) second, the balance to the City.” DOF says in its reply brief that there is no dispute the “vast bulk” of the money went to the City. Ten-Ninety agrees in its respondent’s brief that “the primary settlement obligations are between Ten-Ninety and the City, not between the City and the RDA” There appears to be no dispute that the RDA was supposed to repay the entire 35% to Ten-Ninety. In the absence of any argument or citation of evidence to treat separately the split of money between the City and RDA, we will treat the 35% as a single unit.

In exchange for Ten-Ninety’s payment of the 35%, the City “released” Ten-Ninety from any claims, known or unknown, arising from intentional or negligent misconduct by Ten-Ninety, though Ten-Ninety represented it did not engage in any such misconduct, and the City and the RDA represented and warranted that an investigation did not find sufficient evidence of wrongdoing. The OPA/FA expressly covered “purported bribes, payoffs, kickbacks or extortion” by Ten-Ninety, but said the parties knew of no such claims, and the OPA/FA elsewhere made Ten-Ninety liable for any illegal misconduct.

Although Ten-Ninety agrees it paid the 35% as “Settlement Payments,” the contract calls for Ten-Ninety to get all that money back, plus interest, regardless whether any claims were made or settled. The trial court referred to this as “the Add-Back provision.” The contract itself is not so transparent. Section 2.3 and subdivision (a) of section 2.3 of the Third Amended OPA are titled “Participating Owner’s Payment Obligation.” Section 2.3(a)(i), titled “Residual Tax Revenues,” states that Ten-Ninety

must “pay to the City and the agency an amount equal to 35% of the Residual Tax Revenue allocated and payable to” Ten-Ninety for the duration of plan. The add-back provision is found buried among multiple unnumbered paragraphs which follow paragraph (ii) (titled “Assessments and Sewer Fees”) but are not limited to such fees but speak more broadly about the pledged revenues. One of these paragraphs states, with respect to the “Participating Owner’s Payment Obligation” that: “Notwithstanding the right to receive said payments, neither the City nor the Agency shall be deemed to have any right of any kind in or to retain any Pledged Revenues. . . . All amounts paid to the City and the Agency pursuant to the Participating Owner Payment Obligation shall be deemed approved Development Costs, not subject to the procedure for approval of Development Costs . . . and which Development Costs shall thereafter be payable by the Agency to Participating Owner as provided in Section 3.1 hereof.” Section 3.1 entitles Ten-Ninety to receive 15.5 percent interest on all deemed development costs.

We thus have a curious contract that requires one party to pay money as “settlement payments” for hypothetical claims but requires the other party to pay the money back to the first party plus interest regardless of any claims.

In 1992, the RDA, the City, and Ten-Ninety filed a validation complaint (§ 33501; Code Civ. Proc., § 860 et seq.) seeking validation of the 1992 Third Amended OPA and FA. We observe *post*, uncertainty whether the complaint was served on a state agency as required (§ 33501.5), but we need not resolve that question.

On March 31, 1992, the trial court entered a validation judgment by default because no one filed an opposition. The validation judgment found that all terms, conditions, and provisions of the Third Amended OPA and the Facilitation Agreement were “reasonable, valid and lawful.” The judgment also expressly found reasonable, valid and lawful “the Participating Owner Payment Obligation, including but not limited to the obligation of the Participating Owner to make such payments and the ability of the City and the Agency to accept such payments; the payments measured by Residual Tax

Revenues; the payments measured by Assessments and Sewer Fees; *the provisions that said payments shall be deemed approved Development Costs*; the provisions providing for offsets and the withholding of amounts to be paid under the Participating Owner Payment Obligation; and the provisions providing for the excuse and release of and offsets and [illegible] against the Participating Owner Payment Obligation.” (Italics added.)

DOF’s Post-Dissolution Determinations

After RDA’s dissolution, the City as SA sought to enforce the 35% provision to repay Ten-Ninety by including it in the periodic ROPS’s the SA filed with DOF. (§§ 34171, subd. (h), 34179-34182.) ROPS items approved by the SA oversight board and by DOF are paid from property tax revenues deposited in the Redevelopment Property Tax Trust Fund (RPTTF), processed through the county auditor-controller, and remitted to the SA. (§§ 34182, subd. (c)(1), 34183, subd. (a).) The money in the RPTTF is to be administered for the benefit of holders of former RDA enforceable obligations and the taxing entities that receive pass-through payments and distributions of property taxes. (§§ 34182, subd. (c)(2), 34185.)

DOF initially allowed the entire OPA as an enforceable obligation on several ROPS’s. We discuss, *post*, that those earlier administrative determinations do not estop DOF from later disapproving the same item in subsequent ROPSs.

In February 2015, Libreria del Pueblo, California Partnership, and Virginia Macy (collectively, Libreria) filed their suit against the City, SA, and Ten-Ninety in 2014, naming DOF as a real party in interest. Libreria argued the Dissolution Law rendered the OPA unenforceable. The City, SA, and Ten-Ninety filed demurrers. DOF, which at that time was considering another ROPS, stated it had not yet determined whether the Dissolution Law rendered the OPA unenforceable. The trial court sustained the

demurrers and entered a May 2015 judgment of dismissal, which is the subject of the Libreria appeal.

After Libreria filed suit, DOF received SA's ROPS 15-16A for the period from July 1 to December 31, 2015. Item 51 claimed one million dollars for the OPA. Subsequent ROPSs claimed \$6 million for the first half of 2016, and \$12.5 million for fiscal year 2016-2017. SA itself estimated the debt to Ten-Ninety at \$1.5 billion "which the [SA] staff acknowledges will never be paid off"

On April 10, 2015, the DOF issued a determination letter disallowing the OPA item, stating the SA "has not provided sufficient documentation to support the outstanding obligation or the annual payments," and SA's estimated \$1.5 billion debt to Ten-Ninety that would never be paid off "appears contrary to public policy."

In response, the SA drastically reduced its estimate from \$1.5 billion to \$313 million, claiming it reached the first figure by simply applying the interest rate to the principal through 2032-2033, but the City and Ten-Ninety have recognized for years that the figure would never be paid, due to various factors, including the amount of property taxes generated within the Jurupa Hills project area and other payment obligations of the RDA/SA.

According to a declaration from City Management Services Director and Deputy City Treasurer Lisa Strong, "the total amount of Development Costs accrued and unpaid as of June 30, 1992, after OPA Amendment No. 3 was signed and validated, was \$150,996,000; the total amount of Development Costs as of June 30, 2015, was \$202,992,845; and the total amount of tax increment revenue paid to Ten-Ninety from the inception of the OPA as of June 30, 2015, was \$170,935,714. Based upon the assumption of 2% per year growth in assessed property values within the Redevelopment Project Area, I project the total amount of tax increment which will have been paid to Ten-Ninety by the expiration of the Redevelopment Plan in 2032/2033 to be approximately \$313,000,000."

On appeal, the City/SA and Ten-Ninety cite a declaration from financial consultant Donald J. Fraser that, because section 33675 allows the agency to “estimate” the amount of debt in its “statement of indebtedness” (SOI), it was reasonable for the SA to use the \$1.5 billion dollar figure as an estimate that did not necessarily reflect the actual amount of the obligation or the amount that would actually be paid on that obligation, given the constraints imposed by actual growth in assessed valuation, payments on other obligations, and the redevelopment plan’s time and dollar limits. Fraser opined that, based on the stated principal amount of \$174 million, the interest rate of 15.5 percent, and the total accrued interest of approximately \$988 million, the \$1.5 billion figure was reasonable. Fraser attested that, using an assumed growth rate of 2.14 percent based on a 10-year historical average, the projected amount of payments by 2033 will be about \$353 million, representing a 4.61 rate of return over the term of the OPA without accounting for inflation.

We are not bound by and do not agree with Fraser’s statutory interpretation that \$1.5 billion is a reasonable estimate in compliance with section 33675. We are at a loss as to why Ten-Ninety on appeal implies that DOF’s reference to the \$1.5 billion figure is deceitful, when it was SA’s own figure.

On May 15, 2015, after a meet and confer session, DOF issued a final determination letter, again disallowing the request for payment. The letter noted among other matters that the SA now “suggests that by operation of law the total that can be paid to Ten-Ninety is approximately \$313 million” -- which was contrary to the SA’s prior representation in the ROPS that the debt was \$1.5 billion -- and “the OPA appears to be structured in a manner which prevents the [SA’s] obligation to Ten-Ninety from being retired, and thus, allowing the OPA to exist in perpetuity.” The DOF thus concluded the OPA “appears contrary to public policy and raises questions about the validity of the OPA under Dissolution Law.”

DOF later added as a specific reason to disallow Item 51, that the provisions to funnel 35% of tax monies from the RDA, through the developer, to the City, constitute a sponsor agreement between the RDA and its creator, which the Dissolution Law renders unenforceable. This issue was litigated in the trial court.

The Trial Court Proceedings in the Current Case

The City, SA, and Ten-Ninety filed their petitions and complaints for declaratory and injunctive relief, challenging DOF's determinations (after the court in the *Libreria* lawsuit refused to interfere with DOF's determination which postdated that lawsuit). The court ordered sequestration of tax revenues pending final decision on the merits.

Attorney Stephen P. Deitsch, who represented the City and RDA in negotiating the Third Amended OPA and FA, submitted a June 14, 2016, declaration in the current litigation, attesting: "The Purpose of Amendment No. 3 was, among other things, to provide for certain payments from Ten Ninety to the RDA and City in order to mitigate certain negative fiscal impacts, described below, imposed upon the City and Agency by the development of Southridge Village and the continued existence of Southridge Village ('Settlement')." "The Settlement was intended to satisfy and resolve disputes concerning, 'negative or adverse fiscal, financial or other budgetary effects or impacts upon the City and the Agency concerning or relating to the Development of Southridge Village, the existence of Southridge Village, or the continued operation and maintenance of Southridge Village, including, without limitation, City deficits, capital costs of infrastructure items, Agency administrative expenses, operation and maintenance activities and services, including, without limitation, police service, fire service, or other services of a like or dissimilar nature' [Citing OPA §§ 2.3(b) and 2.3(b)(i) (JA 3187-3188).] *So, for example, in negotiating the terms of the Settlement, the City considered among other things, that the City was facing an estimated annual deficit of \$4 million in providing essential services, such as fire and police, to Southridge Village*

because, unlike commercial development, residential development does not produce sufficient revenues to cover the cost of providing such services.” (Italics added.) This was the conclusion of a consultant Ford & Associates retained by the City. Deitsch shared the report with Ten Ninety “in order to buttress the City’s position that Ten Ninety should be required to help reduce this deficit, which ultimately led to the Settlement, referred to as the ‘Participating Owner Payment Obligation’ [POPO] in Amendment No. 3 to the OPA.” Deitsch did not in this declaration explain the “add-back” provision calling for that money to be repaid to Ten Ninety with interest.

Thus, according to Deitsch, the City was receiving redevelopment money to fund future police and fire operations.

The trial court *tentatively* ruled the validation judgment did not preclude challenges to the OPA as an unenforceable sponsor agreement.

After hearing oral argument, the trial court in its *final* ruling concluded that the validation judgments preclude *any* challenge to the OPA, because courts in California follow the rule that changes in the law do not constitute changed circumstances preventing application of res judicata. The court stated it “has no occasion to consider whether there might be exceptions to this rule, such as when the changes implicate fundamental constitutional rights or raise compelling public policy concerns.”

The trial court nevertheless went on to express its view that, even if the Dissolution Law were to apply, the court would at most sever the add-back provision, which would mean Ten-Ninety would keep 100 percent of tax revenues. In the court’s view, the Third Amended OPA established a structure to allow the principal amount of the OPA Debt to exceed the \$135 million debt limitation by classifying OPA Debt into two categories: (1) Reserve Debt, and (2) Non-reserve Debt. Non-reserve Debt was OPA Debt payable solely from tax increment revenues, but not to exceed “at any one time” the debt limit of \$135 million. Reserve Debt was the amount of OPA Debt in excess of the sum of \$135 million. The court concluded the parties made this change to keep within

the debt limit while keeping a debt in excess of the debt limit which could not be paid from tax increment but could be drawn upon to replenish the Non-reserve Debt if it were to decrease below \$135 million.

The court acknowledged DOF's legitimate skepticism about the opposing parties' claim that all payments will end when the OPA/FA expire in fiscal year 2032-2033, because of clauses such as section 3.4(d)(6) of the OPA: "Payment After Plan Termination. The parties will continue to examine the issue of whether tax increment revenue may be utilized for the payment of OPA Debt and Bond Debt following the expiration of the Plan term." Additionally, section 2.3(e)(v) of the OPA states that if a "Tax Reduction Event" reduces tax revenues in a fixed amount, Ten-Ninety shall get a credit equal to 65 percent of the fixed amount if the reduction "occurs during the duration of the Plan and fifty percent (50%) of such fixed amount if the Tax Reduction Event occurs thereafter." The same section states that, if attorney's fees are incurred in litigating claims that may result in reduced tax revenues, legal fees incurred after duration of the Plan are to be split 50-50 between the City/RDA and Ten-Ninety and "shall be deemed Development Costs not subject to the procedures for approval."

The trial court issued a joint final judgment on August 31, 2016, granting the petitions for writ of mandate, and ruling that the 1992 OPA "is a valid enforceable obligation under the provisions of [the Dissolution Law]." The judgment expressly states, "The Successor Agency's payment obligations to Ten-Ninety under the OPA will terminate at the close of Fiscal Year 2032-2033." The judgment reserves the trial court's jurisdiction to enforce the judgment. A peremptory writ of mandate issued, commanding DOF to reverse its determination and issue a new determination letter approving the OPA as a valid enforceable obligation under section 34171 and authorizing the county auditor-controller to release the sequestered funds. Some other taxing entities who were real parties in interest dismissed their complaints/petitions without prejudice.

DOF filed notices of appeal, which we later consolidated.

On December 23, 2016, DOF advised this court that a partial resolution had been reached, and DOF was no longer challenging Ten-Ninety's right to the 65 percent of the subject RPTTF. The only issue for appeal is the 35%.

DISCUSSION

I

Standard of Review

We review de novo questions of law but apply substantial evidence review to the trial court's findings of fact in support of its decision on a petition for writ of mandate. (*Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 551.) Our review of DOF's determination as an administrative agency is the same as that of the trial court: A writ of mandate under Code of Civil Procedure section 1085 may be issued only to correct an abuse of discretion that exceeds the agency's legal powers. (*Saleeby v. State Bar of California* (1985) 39 Cal.3d 547, 562.) "In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.)

Where the facts are undisputed, but the parties dispute how the law is to be applied, we accord at least weak deference to an agency's interpretation of its governing statutes where its expertise gives it superior qualifications to do so (in contrast to strong deference given in other jurisdictions), but the issue is ultimately subject to our de novo review. (*County of San Bernardino v. Cohen* (2015) 242 Cal.App.4th 803, 809 (*San Bernardino*).)

II

Validation Judgment

DOF argues the trial court erred in concluding that the binding and conclusive effect of the 1992 validation judgment bars consideration of the effect of the 2011 Dissolution Law. Applying de novo review to this question of law, we agree with DOF.

At the time of the 1992 validation action in San Bernardino County Superior Court, the CRL in section 33501 authorized the filing of a validation action under Code of Civil Procedure section 860 et seq. to determine validity of a redevelopment plan. (See also, Gov. Code, § 53511 [local agency may bring action to validate contracts, obligations, bonds, or evidence of indebtedness pursuant to Code of Civil Procedure section 860 et seq.]; §§ 34189.1-34189.2.)

Code of Civil Procedure section 860 provides: “A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. . . .” All persons interested in the subject matter are indispensable parties who must be named and served with prescribed summons by publication in order that there may be a binding and conclusive judgment. (*Community Redevelopment Agency of Los Angeles v. Superior Court of Los Angeles County* (1967) 248 Cal.App.2d 164.)

A validation judgment issued within the authority of the court under the CRL is binding and conclusive under section 33503, which provides: “The judgment, if no appeal is taken, or if taken and the judgment is affirmed shall be forever binding and conclusive, *as to all matters therein adjudicated or which at that time could have been adjudicated*, against the agency and against all other parties and if the judgment determines that the agency is lawfully established, that the redevelopment plan is valid

and effective, that the agency is authorized to issue such bonds and that such bonds when issued will be valid, the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.” (§ 33503, italics added.) A general validation judgment is similarly binding and conclusive: “The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 [set aside judgment] and 473.5 [relief from default], thereupon become and thereafter be forever binding and conclusive, as to all matters therein *adjudicated or which at that time could have been adjudicated*, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive.” (Code Civ. Proc., § 870, subd. (a), italics added.)

In considering the effect of subsequent legislation on a court’s validation judgment, we are mindful of the concern about separation of powers. (*City of Galt v. Cohen* (2017) 12 Cal.App.5th 367, 380 (*Galt*) [no need to address, because validated agreement did not give rise to enforceable obligations anyway].)

Courts have recognized the Legislature’s power to render unenforceable pre-existing contracts in order to stop abuses by RDAs and the cities or counties that created them. (*Matosantos I, supra*, 53 Cal.4th 231; *Pasadena, supra*, 228 Cal.App.4th at pp. 1463-1467.)

Here, the validation judgment was not “forever binding” because the validity of the agreement at the time of the validation judgment did not adjudicate and could not have adjudicated the lawfulness of the agreement pursuant to the later-enacted dissolution statutes in which the Legislature intended “to retroactively invalidate Creator/RDA agreements and claw back payments that were legal when made.” (*Grass Valley, supra*, 17 Cal.App.5th at pp. 585, 587.) “[DOF] does not attack the lawfulness of the agreements in question as of the time they were entered. Instead, [DOF] is applying the

later-enacted dissolution statutes, which were designed to unwind them. The validity of [DOF's] actions could not have been adjudicated in the validation cases, which preceded the Great Dissolution.” (*Id.* at p. 587, italics omitted.) We filed the *Grass Valley* opinion on November 20, 2017 -- after the opening and respondents’ briefs in these consolidated appeals but before DOF’s reply brief, which does cite *Grass Valley*.

The Legislature’s enactment of the Dissolution Law does not interfere with the judicial branch’s validation judgment so as to constitute a violation of the principle of separation of powers. (Cal. Const., art. III, § 3 [“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution”].) All that the validation judgment established with respect to the OPA/FA was the validity of its terms between the parties to the agreement under the law as it existed at that time. It did not purport to establish any absolute right to receive tax increment or duty to make or receive payments under the agreement that was superior to the Legislature’s “plenary power” over the CRL (subject to constitutional restrictions) in the regulation of the use of former tax increment. (*Brentwood, supra*, 237 Cal.App.4th at pp. 496-497.) The terms of the OPA/FA, as enforced through the validation judgment, directed payments out of former tax increment or other funds legally available. Upon the Legislature’s enactment of the Dissolution Law, neither former tax increment nor any other funds are legally available for financing the reimbursement payments unless the Dissolution Law authorizes them. Thus, an enforceable obligation arising out of a validation judgment does not exist.

In ruling that the 1992 validation judgment was conclusive of all issues, the trial court here felt bound by the Fourth District opinion in *Macy v. City of Fontana* (2016) 244 Cal.App.4th 1421 (*Macy or Fontana II*), upholding the Third Amended OPA. There, a resident and community groups petitioned for a writ of mandate to require the RDA to deposit 20 percent of tax increment into a low- and moderate-income housing fund (LMIHF) as mandated by the CRL. (*Id.* at p. 1425.) The RDA had failed to pay into the

fund between 2001 and 2010. (*Id.* at p. 1428.) After enactment of the Dissolution Law, the petitioners added the city as a municipality and as SA. We note the City of Fontana assumed responsibility only as “Successor Agency” to wind down the RDA’s affairs, not as “Housing Successor” to expend remaining funds in the LMIHF. (§§ 34176-34176.1; *City of Petaluma v. Cohen* (2015) 238 Cal.App.4th 1430, 1435.)

In *Macy*, the trial court sustained a demurrer by the city *as a municipality*. The Fourth District affirmed, holding that neither the CRL (which had mandated 20 percent for affordable housing since 1976) nor the Dissolution Law (which discontinued the 20 percent obligation) subjected *the City as a municipality* to the RDA’s statutory duty to use tax increment revenues for affordable housing. (*Id.*, *supra*, 244 Cal.App.4th at pp. 1426, 1428, 1432-1433.) In finding the validation judgment conclusive, *Macy* distinguished other cases, e.g., where a financing agreement validation judgment did not prevent a constitutional challenge to a later repayment contract (*Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164).

Macy said that, even though a 2001 audit by the Department of Housing and Community Development (DHCD) found the RDA had failed to pay into the LMIHF, and even though the RDA agreed to pay \$6.1 million into a LMIHF in a settlement agreement with DHCD (*id.* 244 Cal.App.4th at p. 1427), the 1992 validated OPA asserted the RDA had met its low- and moderate-income housing obligations. (*Id.* at p. 1433.) The Fourth District said, “the central premise of the city’s participation in the OPA is the agreement’s affirmation that the agency was meeting its obligations under the CRL and that it was lawful to distribute the agency’s tax increment funds to Ten-Ninety and the city. The central premise of plaintiffs’ claims is, of course, their assertion that the agency was not meeting its obligations under the CRL and that its distributions to Ten-Ninety and the city were not lawful. By obtaining the validation judgment, the city protected itself, as well as the agency and Ten-Ninety, from precisely the claims that plaintiffs now assert arise under and by virtue of the agreement.” (*Id.* at pp. 1433-1434.)

We deny DOF’s request in a footnote of its appellate brief asking that we take judicial notice of court dockets of related cases including *Macy*, which assertedly was transferred to the Sacramento County Superior Court after remittitur and then voluntarily dismissed.

We explained in *Grass Valley* that *Macy* is distinguishable. The *Macy* plaintiffs were trying to impose on *the City as a municipality* a duty to pay into Fontana’s low- and moderate-income housing fund (LMIHF) money that *the RDA* allegedly should have paid into that fund under the CRL. The *Macy* court found no such statutory duty for the City and also found that the attack was precluded by the validated OPA’s assertion that the RDA had met its affordable housing obligations under the CRL, and a CRL amendment that took effect in 1993 (and more strictly limited the ways in which RDAs could meet affordable housing obligations) did not constitute a “changed circumstance” allowing attack on the validation judgment. (*Macy, supra*, 244 Cal.App.4th at pp. 1426-1427, 1435.) (As noted *post*, we do not agree with *Macy*’s statement that the 1992 validation judgment established the validity of the OPA’s assertion that the RDA had met its CRL affordable housing obligations.)

We said in *Grass Valley* that *Macy* was distinguishable because there the issues pressed by the challengers “were live issues when the validation action in that case had been filed, whereas the issues herein [in *Grass Valley*], the applicability of mechanisms designed to unwind RDAs to specific agreements, could not have been presented in the relevant validation actions. As [DOF] points out, it is not challenging the validity of any agreements. [Citation.] Rather, it is determining whether or not the agreements are ‘enforceable obligations’ under the present dissolution statutes, an entirely different question. Contrary to the City’s view, ‘valid’ for one purpose need not equate to ‘enforceable’ for an entirely different purpose, unknown at the time the validation actions were filed. [Citation.]” (*Grass Valley, supra*, 17 Cal.App.5th at p. 588, italics omitted.)

In a supplemental letter filed by the City/SA on March 6, 2019, at this court's invitation, the City/SA ask us to disregard *Grass Valley* because the City/SA's position remains that the validation judgments themselves render the OPA obligation "enforceable obligations" under the express language of section 34171, subd. (d). However, as we state post [p. 28], that statute renders judgments enforceable obligations only if the judgment is "against the former redevelopment agency" The validation judgments, entered at RDA's request are obviously in favor of, not against, RDA, and the City/SA offer no discussion, analysis or authority to the contrary.

In another Fourth District case arising after the 1992 validation judgment, *Torres, supra*, 153 Cal.App.4th 902, was a direct appeal from a 2005 validation judgment issued by the San Bernardino Superior Court on the RDA's complaint for validation of a 2002 settlement agreement and of issuance of \$40 million in tax allocation bonds. Low-income resident Jeannette Torres and nonprofit community group Libreria del Pueblo (who had standing, having answered and opposed the validation complaint under Code Civ. Proc., § 861.1 [interested persons may oppose validation]), appealed from the validation judgment. (*Id.* at p. 908.) The Fourth District reversed the validation judgment, holding (1) the 2002 settlement agreement was not a "contract" within the meaning of the validation action statute and thus was not subject to a validation action, and (2) the RDA's issuance of \$40 million in tax allocation bonds exceeded its bonded debt limitation of \$135 million set forth in the amended redevelopment plan. (*Id.* at pp. 908-914.)

Torres held the trial court should have rejected the validation action as to the new bonds despite the previously-validated OPA. (*Id.*, *supra*, 153 Cal.App.4th at p. 913.) "The courts cannot validate ongoing illegality. [Citation.] Furthermore, even when an illegal act may be immune from facial attack, it can be challenged under new factual circumstances. [Citation.] In the present case, the 1992 OPA amendment was validated but the 2003 proposal to issue new tax allocation bonds should not have been validated

because it violated the redevelopment plan's debt limitations." (*Ibid.*) The appellants were "properly attacking, not the previously validated OPA amendment, but the implementation of the redevelopment plan by allowing issuance of tax allocation bonds in 2003 that exceed the plan's limitation on indebtedness secured by tax increment revenue. This is not an issue that could have been anticipated or decided in 1987 when the redevelopment plan was amended to raise the debt ceiling to \$135 million. [Citation.]" (*Ibid.*) The *Torres* court gave another reason for not validating the new bond issuance: The RDA's failure to meet statutory requirements to set aside 20 percent of tax increment revenue for affordable housing. (*Id.* at p. 914.) Beginning with the 1987 OPA, the RDA pledged all tax increment revenue to Ten-Ninety and was not using any tax increment revenue for affordable housing. (*Ibid.*) A 1993 law limited revenue for affordable housing to pay for infrastructure improvements unless they are part of new construction or rehabilitation. (*Ibid.*, citing § 33334.2, subd. (e).) "The state audit found \$53 million was owing to the Jurupa Hills housing fund, belying Fontana RDA's claim that it was complying with the statutory requirements. Finally, Fontana RDA has continued its course of noncompliance by proposing to issue tax allocation bonds, the proceeds from which are payable solely to Ten-Ninety and none for affordable housing." (*Id.* 153 Cal.App.4th at p. 914.) Although the appellants may not be able to challenge earlier actions by the RDA, "they should be able to curtail this most recent effort to evade the statutory obligation to provide and promote affordable housing." (*Ibid.*)

Indeed, the RDA promised in section 3.5, subdivisions (d)-(e) of the 1992 OPA, to give all tax increment revenues to Ten-Ninety, and none to the low- and moderate-income housing fund (§ 33334.2) unless Ten-Ninety consented, or the RDA was "directed to take contrary action by a final valid order of court having jurisdiction over the matter in an Action commenced against the Agency for that purpose. . . ." In any such litigation, Ten-Ninety would provide the RDA with a defense, and Ten-Ninety would recover its legal expenses as "deemed . . . Development Costs." *Macy, supra*,

244 Cal.App.4th at pages 1433-1434, stated its view that this provision, in simply recognizing the possibility of a judicial challenge, did not prevent the RDA or City from asserting the 1992 validation judgment as a binding and conclusive bar to litigation.

We reaffirm our holding in *Grass Valley*. The validation judgment does not prevent DOF and the courts from applying the Dissolution Law to determine whether the new statutes render the loan agreement unenforceable to the extent it represents a now-unlawful sponsor arrangement between the former RDA and its creator -- an issue which was not and could not have been adjudicated before enactment of the Dissolution Law. The City/SA argue that allowing subsequent legislation to have an impact on an earlier validation judgment could jeopardize bondholders' interests. No such concern is present here, however, because the Dissolution Act expressly protects the interests of third party bondholders. (§ 34171(d)(1)(A).)

Because we conclude the 1992 judgment does not preclude this litigation, we need not request supplemental briefing from the parties on a different issue not raised by the parties, described below, which arguably might render the 1992 validation judgment void. The Joint Appendix on appeal does not show whether the 1992 validation complaint was served on the Director of the state Department of Housing and Community Development (DHCD), as required by section 33501.5, which since 1988 has provided: "In any judicial action specified in Section 33501 [validation action] in which the validity of actions of the agency under Section 33334.2 [housing for persons of low or moderate income], 33334.3 [Low and Moderate Income Housing Fund (LMIHF)], or 33334.6 [deposit of tax increment monies into LMIHF] are in issue, the party initiating the judicial action [or otherwise challenging validity] shall serve a copy of the complaint [or answer challenging validity] upon the Director of Housing and Community Development [DHCD] within 10 days after filing that complaint or answer with the court. The court may render no judgment in the matter or provide other permanent or provisional relief to any party until proof of service of the [DHCD] pursuant to this

section has been submitted to the court. Nothing in this section shall be deemed to expand the scope of Section 33501.” (§ 33501.5; Stats. 1988, ch. 1604, § 7.)

Here, various factors suggest the possibility that DHCD was not served. The 1992 validation complaint did not name DHCD as an interested party, even though affordable housing was at issue in the 1992 OPA, e.g., the 1992 OPA asserted compliance with section 33334.2 and contained provisions in the event of claims “related to low or moderate income housing entitlement or set aside”

Despite the OPA’s assertion of compliance with affordable housing statutes, the RDA’s failure to comply with its CRL affordable housing obligations led it to enter the 2002 settlement with DHCD, as described in *Torres*. Although the CRL was amended effective January 1993 (Stats. 1992, ch. 1356, § 8), i.e., after the 1992 validation judgment, *Torres* said, “What the record inescapably demonstrates is [Fontana RDA’s] lack of compliance with the required . . . contribution for affordable housing since 1987.” (*Torres, supra*, 153 Cal.App.4th at p. 914.) Thus, despite the 1992 OPA’s assertion that RDA was in compliance with CRL affordable housing requirements, we know from the subsequent settlement with DHCD as described in *Torres*, at pages 913-914, that was not the case.

Although *Macy* accepted without question the validated OPA’s assertion that RDA was in compliance with affordable housing requirements (*Macy, supra*, 244 Cal.App.4th at pp. 1433-1434), *Macy* is of limited value here because the dispositive holding was that nothing imposed on the city *as a municipality* the RDA’s duty to use tax increment funds for affordable housing. (*Ibid.*) *Macy* summarily dismissed *Torres* as a distinguishable challenge to an attempt to perpetuate improper distribution of funds, as opposed to an attack on the validity of the OPA or any prior action of the agency. (*Macy, supra*, 244 Cal.App.4th at p. 1434.)

In any event, we need not request supplemental briefing to resolve questions concerning notice to DHCD under section 33501.5, because we conclude the 1992

validation judgment does not preclude DOF from litigating whether the 35% provisions represent an unenforceable sponsor agreement under the Dissolution Law.

III

The 35% Provisions Are Unenforceable

DOF's previous approval of the 35% provisions in earlier ROPS's did not estop DOF from later disapproving the item in subsequent ROPS's. (*Galt, supra*, 12 Cal.App.5th at p. 385.) The strong public policy to distribute tax increment revenue to fund core governmental services (§ 34167, subd. (a)) "would be unjustifiably nullified if local agencies were allowed to cite earlier actions of DOF, which made preliminary and perhaps unstudied decisions, to claim that the public policy decisions of the Legislature cannot be given effect." (*Galt, supra*, at p. 385.)

The City/SA appear to assume that the 1992 validation judgment is an enforceable obligation under section 34171(d)(1)(D), which defines "enforceable obligation" to include: "(D) Judgments or settlements entered by a competent court of law or binding arbitration decisions *against the former redevelopment agency* [italics added] Along with the successor agency, the oversight board shall have the authority and standing to appeal any judgment or to set aside any settlement or arbitration decision." However, the 1992 validation judgment, which was entered at RDA's request, is not a judgment "against the former [RDA]," as specified in the statute. The City/SA offer no discussion, analysis, or authority, and we therefore need not consider the matter. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

The City/SA and Ten-Ninety maintain the Third Amended OPA is enforceable under section 34171(d)(1)(E), which defines enforceable obligation to include: "(E) Any legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy. However, nothing in this act shall prohibit either the successor agency, with the approval or at the direction of the oversight board, or the

oversight board itself from terminating any existing agreements or contracts and providing any necessary and required compensation or remediation for such termination. Titles of or headings used on or in a document shall not be relevant in determining the existence of an enforceable obligation.”

As indicated, DOF in these appeals has dropped its arguments about debt limit or public policy.

We agree with DOF that the 35% provisions are unenforceable obligations under the specific statutory exclusion of section 34171(d)(2), which *excludes* from the definition of “enforceable obligations” arrangements between an RDA and the city that created it. DOF argues the 35% provisions represent unenforceable sponsor agreements under section 34171(d)(2), which provides that “ ‘enforceable obligation’ does not include any agreements, contracts, or arrangements between the city . . . that created the redevelopment agency and the former redevelopment agency.” Similarly, section 34178, subdivision (a), provides that “agreements, contracts, or arrangements between the city . . . that created the redevelopment agency and the redevelopment agency are invalid and shall not be binding on the successor agency.” These specific provisions govern over the general provision (§ 34175) cited by Ten-Ninety, that the Legislature intended that pledges of revenues associated with “enforceable obligations” be honored.

Respondents note that section 34171(d)(2), after excluding sponsor agreements, goes on to say: “. . . However, written agreements entered into (A) at the time of issuance, but in no event later than December 31, 2010, of indebtedness obligations, and (B) solely for the purpose of securing or repaying those indebtedness obligations may be deemed enforceable obligations for purposes of this part. . . .” However, section 34171, subdivision (e), defines “indebtedness obligations” as “bonds, notes, certificates of participation, or other evidence of indebtedness, issued or delivered by the redevelopment agency, . . . to *third-party* investors or bondholders” (Italics added.) Respondents offer no analysis for applying that provision here. Though the OPA says in section

3.4(b), that the RDA’s obligation to pay development costs to Ten-Ninety “shall be treated” as a “bonded or other indebtedness,” and Ten-Ninety “is deemed to be a ‘bondholder,’ ” Ten-Ninety is not a “third-party” bondholder or investor but rather is a contracting party. Plus, section 34171(d)(1)(A) defines the term “enforceable obligations” as including “Bonds, as defined by Section 33602 and bonds issued pursuant to Chapter 10.5 (commencing with Section 5850) of Division 6 of Title 1 of the Government Code” (§ 34171(d)(1)(A).) Respondents do not show that the OPA qualifies under this definition.

Respondents argue section 34171(d)(2) does not apply where a private party is also a party to the agreement, and here the 35% is not an agreement between the City and its RDA, but rather payment by Ten-Ninety from its own private money.

We conclude the 35% provisions constitute an unenforceable sponsor agreement in disguise. Section 34171(d)(2) on its face contains no exclusion if a private party is also a party to the contract. The presence of a private party does add a layer of complexity, raising questions whether unenforceable provisions can be severed from the contract without unconstitutional impairment of *private party* contract rights, but we address those questions, *post*.

“[T]he law respects form less than substance.” (Civ. Code, § 3528.) “The end attained and not the form of the transaction must be considered by the court in determining its substance and legal effect.” (*Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 237.) “Under the ‘end result test,’ purportedly separate transactions will be amalgamated with a single transaction when it appears that they were really component parts of a single transaction intended from the outset to be taken for the purpose of reaching the ultimate result.” (*Shuwa Investments Corp. v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1650.)

Distilled to its essential substance rather than the form of the transactions, the RDA/SA gives tax money to the City, funneled through Ten-Ninety. Even though the

35% ostensibly constitutes “settlement payments” by Ten-Ninety, it is not clear what is being settled. The contracts make vague and confusing references to “claims” in contracts seemingly drafted to thwart comprehension. The parties to the OPA/FA cannot even agree on appeal as to what Ten-Ninety’s 35% payments “settle.” Ten-Ninety’s brief vaguely rambles about “certain disputes” and that “the disputes concerned whether Ten-Ninety had complied with agreements and obligations to mitigate negative fiscal impacts to the City from the development of Southridge Village, as intended under the original OPA,” which called for Ten-Ninety to finance and construct the project and for the RDA to repay the development costs. The City/SA’s brief, reiterating the declaration of the City/RDA’s attorney who negotiated the Third Amended OPA, states that, “in negotiating the Settlement, the City considered, among other things, the fact that it was facing an estimated annual deficit of \$4 million to provide essential services, such as fire and police, to Southridge Village because, unlike commercial development, residential development does not produce sufficient revenues to cover the cost of providing such services.” And, as noted in the City/SA’s brief, section 2.3(b)(i) of the OPA says the settlement was intended to “resolve disputes” between the City/RDA and Ten-Ninety about “negative or adverse fiscal, financial, or other budgetary effects or impacts upon the City and [RDA] concerning or relating to the Development of Southridge Village, the existence of Southridge Village, or the continued operation and maintenance of Southridge Village, including, without limitation, City deficits, capital costs of infrastructure items, Agency administrative expenses, *operation and maintenance activities and services, including, without limitation police service, fire service, or other services of a like or dissimilar nature . . .*” (Italics added.)

The City/SA thus admit that 35% of the tax revenues the SA directs to Ten-Ninety as “development costs” instead goes to pay ongoing public services.

Yet the 35% inexplicably becomes added “development cost” debt which the former RDA, and now the SA, owes to Ten-Ninety, with interest accruing at 15.5

percent. Thus, the former RDA served, and the SA continues to serve, as guarantor of tax monies effectively loaned to the City that created the RDA.

This is so, even though the City, SA, and Ten-Ninety all agree that the money will never be repaid to Ten-Ninety. They told the trial court at the hearing that the RDA/SA do not have to pay back the 35% to Ten-Ninety. Ten-Ninety's lawyer argued the Settlement Agreement was not a give-away; rather, "[i]t basically created a fund that was available to Ten-Ninety, which Ten-Ninety could access by way of set-off in other remedies that were available under the OPA to satisfy creditors that if indeed there was a breach of a warranty or . . . covenant in the OPA agreement, that those funds would be available to fill the gap because there were really no other funds available; and by having the City join in the covenants with the RDA, it added additional strength. [¶] If there is consideration of a severance, . . . the elimination of the add-back is really not relevant because it never was -- it never is going to be part of the debt that would be ever [*sic*] paid."

At the trial court hearing, DOF's attorney noted his "suspicion" that the deal was structured because even back in 1992, there was not enough tax increment to keep up with the debt service on what was being paid to Ten-Ninety. So the add-back provision helped ensure that the debt would never be retired but would continue to grow and would ensure the RDA's ability to claim debt and entitlement to tax increment. Though the add-back might be irrelevant, the contracting parties apparently considered it of value, and in any event, what was relevant was the millions of dollars of "settlement payments" going to the City, which have a practical consequence as a direct diversion of tax increment from RDA to City, using Ten-Ninety as a conduit.

The City, SA, and Ten-Ninety maintain that, once the tax money reaches the "fiscal agent" (who they claim is Ten-Ninety's agent), the character of the monies that make up the 35% changes into private monies belonging to Ten-Ninety. They maintain Ten-Ninety has not assigned to the City the right to receive Ten-Ninety's tax revenues

from the RDA, but instead has merely assigned its interest in 35% of the tax revenues paid to Ten-Ninety through the fiscal agent and, once paid to the fiscal agent, the funds lose their character as tax revenues and become Ten-Ninety's own private money.

However, the fiscal agent is everyone's agent. Section 3 of the FA, titled Fiscal Agent Agreement, states in part that the Fiscal Agent receives all payments "on behalf of and for the account of Participating Owner" and all such payments and pledged revenues shall be paid "to the Participating Owner on the one hand, and to the City and the Agency on the other hand," but that "*the Fiscal Agent, with respect to the receipt of Pledged Revenues payable to the City and the Agency pursuant to said Section 2.3(a) [of the OPA, Participating Owner's Payment Obligation] and as limited thereby, shall be deemed the agent of the Agency and the City, with the Agency and the City having rights and remedies corresponding to those provided in favor of Participating Owner under the existing Agreement. . . .*" (Italics added.) And section 1.16 of the OPA states that the administrative costs and fees of the Fiscal Agent "shall be paid from Tax Revenues"

Additionally, Ten-Ninety's payment obligation is tied to the tax increment because, in the event of a "tax reduction event" that reduces the amount of tax increment received by Ten-Ninety, Ten-Ninety does not have to use its own private money but instead gets a credit off its payment obligation, per section 2.3 of the OPA. In a footnote on appeal, Ten-Ninety summarily asserts the 35% it paid was its own private funds, because *San Bernardino, supra*, 242 Cal.App.4th at page 811, held that once the county loaned money from its general fund to its redevelopment agency, the money did not retain its character as tax revenues. We held in *San Bernardino* that DOF's rejection of repayment of the county's loan to its former RDA was not a reallocation of local tax revenues in violation of California Constitution, article XIII, sections 24 and 25.5, and the RDA's agreement to repay the county for the loan was unenforceable under the Dissolution Law. Here, no such constitutional claim is presented, and we do not see how that case helps respondents here.

The purported purpose of continuously giving 35% to the City and RDA was to compensate for “negative fiscal impacts,” and the City in the concurrently-executed “Facilitation Agreement” provided “releases” for negligent or intentional misconduct by Ten-Ninety, while also asserting an investigation showed no evidence of misconduct. Yet the City/SA’s attorney told the trial court there is no “release” in the OPA or FA, but just a waiver of a right to seek rescission of the OPA.

Despite being characterized as settlement payments, the 35% is treated as a loan to the City, which the RDA/SA is supposed to pay back to Ten-Ninety as OPA debt characterized as “development costs” *plus* 15.5 percent interest per year.

Neither the City, SA, nor Ten-Ninety offer any explanation for the add-back provision. They merely claim Ten-Ninety was never going to be paid back. Yet the SA initially claimed in the ROPSs that the debt to Ten-Ninety was \$1.5 billion (which included payback). When challenged by DOF, the SA reduced it to \$313 million.

The City, SA, and Ten-Ninety offer little help in making any legitimate sense of the deal. We observe that, in the 1992 validation action, the City, RDA, and Ten-Ninety told the court in their memorandum of points and authorities in support of ex parte application for default judgment: “The payments by the Participating Owner are voluntarily agreed to, are supported by valid consideration, and are for the purpose of resolving a dispute concerning the prior understandings of the parties that the Participating Owner would mitigate negative and adverse impacts upon the City and the Agency from the development and existence of Southridge Village. The City and Agency also agree that the payments made to the City and Agency shall constitute approved Development Costs, meaning the Agency is obligated, to the extent of tax increments and other revenues, to ultimately repay the Participating Owner, with interest, for such payments if such future revenues are available. This is a reasonable provision, given that the Participating Owner is parting with a significant amount of its current receipts from the Agency and City and given that the Agency and City will receive their

full benefit of the bargain -- the mitigation of adverse financial impacts which have been and may be created by the development of Southridge Village.” On its face, this makes no sense because if Ten-Ninety’s payment of 35% is supposed to pay for mitigating negative impacts of the project, then why is Ten-Ninety supposed to get that money paid back to it?

Additionally, the contracts contain curious provisions releasing Ten-Ninety from liability for illegal conduct such as bribery, while also saying there is no evidence of such conduct, yet also saying Ten-Ninety is on the hook for any judgment finding any such conduct on its part. Contrary to Ten-Ninety’s position on appeal, DOF does not engage in “slandorous speculation” by referencing illegal misconduct. Section 7 of the FA expressly states “[T]he City and Agency . . . release any and all of the following particular claims, known and unknown: [¶] a. That the City and Agency were induced to enter into the Documents by . . . fraud, bribery, duress, menace [etc.] . . . by anyone including Participating Owner [Ten-Ninety]. [¶] b. That the City or Agency is excused from performing its obligations under the Documents as the result of . . . kickbacks, bribes, payoffs, false invoices, fictitious construction bills, [etc.] . . . by anyone including Participating Owner.” Section 7, subdivision (i), of the FA states the foregoing provisions release claims of “bribery, payoff, kickback, or extortion of which the City or the Agency had knowledge” as defined in section 2.3(f)(iii) of the OPA. Section 2.3(f)(iii) of the OPA states that Ten-Ninety “warrant[s] and represent[s]” it has not paid bribes, payoffs, or kickbacks; the City/RDA are acting in reliance on that warranty/representation; and the City/RDA conducted its own investigation of allegations of bribery, kickbacks, etc., and did not find “sufficient evidence to prove any such criminal or civil wrongdoing by” Ten-Ninety or its principals. And section 14.7 of the OPA relieves the City and Agency from any obligation to indemnify Ten-Ninety if Ten-Ninety is “found to have committed fraud, conspiracy or bad faith breach of fiduciary

duty,” and Ten-Ninety “shall reimburse the City and the Agency for such costs of defense and bear the cost of any such judgment.”

Ten-Ninety acknowledges on appeal that a release of liability for criminal conduct surely violates public policy. We do not base our opinion on that basis, since that point could have been adjudicated at the time of the 1992 validation judgment. But the curious drafting supports the overall impression of deliberate obfuscation.

We conclude that the 35% provisions in the OPA/FA constitute a sponsor agreement rendered unenforceable by the Dissolution Law.

Ten-Ninety argues the only remedy for an unenforceable sponsor agreement is that the agreement between the city and its RDA is “invalid and shall not be binding on the successor agency.” (§ 34178, subd. (a).) In Ten-Ninety’s view, this means that only the add-back provision can be invalidated, and that Ten-Ninety should henceforth receive 100 percent of tax revenues with no obligation to pay 35% to the City/SA. We disagree because, as we have explained, Ten-Ninety is the funnel by which the City and its RDA executed the program diverting funds from the RDA to its sponsoring City.

IV

Severability

DOF argues that all of the 35% provisions should be and can be severed from the OPA, while leaving intact the remaining obligations that run in favor of Ten-Ninety, such that Ten-Ninety will receive only 65 percent of the tax revenues, and the rest will go to other taxing entities. We agree with DOF. This is consistent with Ten-Ninety’s agreement in the OPA to accept 65 cents on the dollar and Ten-Ninety’s admission in the trial court and on appeal that it never expected to get the 35%.

Civil Code section 1599 codifies the common law regarding severance and provides: “Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and

valid as to the rest.” The overarching inquiry is whether “ ‘ “the interests of justice” ’ ” would be furthered by severance. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123-124.) Severance prevents parties from gaining an undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement, particularly when there has been full or partial performance of the contract. (*Ibid.*) Severance also conserves a contractual relationship where it can be conserved without condoning an illegal scheme. (*Ibid.*)

For a contract that becomes partially illegal and/or impossible to perform, a proper remedy is cancellation of the illegal or impossible part. (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1126.) “ ‘ “[W]hether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties. . . .” [A] contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side.’ ” (*Id.* at pp. 1126-1127, italics omitted.)

The decision whether to sever illegal portions and enforce the remainder is a discretionary decision for the trial court to make based on equitable considerations. (*MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 803.) We disregard Ten-Ninety’s mischaracterization that the trial court “saw through the DOF’s hyperbole, false intimations of nefarious dealings and inaccurate characterization of the effect of the settlement on the OPA obligations.” We also reject the City/SA’s flawed argument that DOF has failed to challenge the court’s factual findings and thereby forfeited such matters.

Rather, the trial court, after finding the validation judgment foreclosed consideration of the Dissolution Law, went on to express its view that a sponsor agreement should not be invalidated unless it could be severed so as not to impair a

private third party's contractual rights. "Ten-Ninety's agreement to make Settlement Payments is inextricably intertwined with numerous other provisions of the Agreement, including the releases and Ten-Ninety's offset, credit, and termination rights. It is not clear to this court that Settlement Payments could be severed without unduly interfering with the remainder of the Settlement Agreement. Thus, even if this court were to find a violation of section 34171(d)(2), the court would sever only the Add-Back Provision of the OPA, which would have no practical effect on the amount of tax increment paid to Ten-Ninety."

We are not bound by the trial court's ruling, because the court erred as a matter of law in ruling that the validation judgment precluded application of the Dissolution Law, and then merely said it was "not clear" to the court that the 35% provisions could be severed. We explain it is clear.

As we have seen, the Fiscal Agent acted as agent for both Ten-Ninety and the City and transferred 35% of tax revenues to the City (with a small portion to the RDA, which the parties do not separately argue). The OPA/FA recited that the 35% payments were to compensate the City and its RDA for "negative fiscal impacts" caused by Ten-Ninety, yet also called for the RDA to repay those amounts to Ten-Ninety with interest, yet no one expected Ten-Ninety to be repaid. The 1992 OPA "acknowledge[d] that Participating Owner has completed its Infrastructure obligations relating to the Development of Southridge Village," yet required the Participating Owner to keep paying 35% continuously at least until 2032/2033. We see no evidence that severing the 35% payments to the City henceforth will deprive Ten-Ninety of any hypothetical protection from hypothetical claims that may have been threatened 25 years ago.

Moreover, the 1992 OPA acknowledges in section 2.3(e) that Ten-Ninety's payment obligation is based on its expectation that the RDA will continue to get the tax revenues and give them to Ten-Ninety, and that Ten-Ninety's payment obligation may be reduced in some circumstances, such as a "Tax Revenue Reduction Event[].".

Additionally, the Third Amended OPA contains an express severance clause at section 14.4, stating: “The provisions of this Agreement are severable except as herein provided. If any provision or clause of this Agreement is held invalid, the invalidity shall not affect any other provision or application of this Agreement which can be given effect without the invalid provision or application. . . .”

It thus appears that the unenforceable City-RDA arrangement (both the 35% payments funneled through Ten-Ninety and the add-back) can be severed without affecting the central purpose of the OPA, which was to have Ten-Ninety finance and develop a project and to be repaid for its development costs.

The City/SA and Ten-Ninety argue that, if the Third Amended OPA is invalidated in its entirety, then the Second Amended OPA remains extant, with its judicially-validated pledge of 100 percent of tax increment to Ten-Ninety. However, we need not and do not hold the Third Amended OPA invalid in its entirety.

We conclude that all 35% provisions can be severed from the OPA/FA, leaving Ten-Ninety’s agreement to accept 65 percent of tax revenues. The Dissolution Law will redirect the 35% to other taxing entities. (§§ 34183, subd. (a)(4), 34187, 34188.)

V

Severance Will Not Unconstitutionally Impair Ten-Ninety’s Contract Rights

DOF argues severance will not unconstitutionally impair contract rights of private party Ten-Ninety. We agree.

No state shall pass any law impairing the obligation of contracts. (U.S. Const., art. I, § 10.) The federal contract clause is directed only at legislation, but the state contract clause (Cal. Const., art. I, § 9 [law impairing obligation of contracts may not be passed]) has been held also to apply to judicial action. (*White v. Davis* (2003) 30 Cal.4th 528, 548.) The provision does not protect contract rights of public entities such as cities and counties, which are creatures of the state. (*Star-Kist Foods, Inc. v. County of Los Angeles*

(1986) 42 Cal.3d 1, 5-6.) Thus, the City/SA cannot and has not argued impairment of their own contractual rights. Instead, the City/SA in their respondents' brief on appeal argue that invalidation of the 35% provisions would unconstitutionally impair *Ten-Ninety's* contractual rights. However, the City/SA have no right to assert unconstitutional impairment of contract rights of others. (*Galt, supra*, 12 Cal.App.5th at p. 378.) We therefore disregard the City/SA's argument.

Ten-Ninety offers little analysis and cites no evidence or authority for an unconstitutional impairment of its contractual rights in this case. It simply claims that DOF's arguments "were unsupported by evidence, disingenuous, or amounted simply to second-guessing the trial court's conclusions." Ten-Ninety argues DOF is incorrect in arguing that, because Ten-Ninety assigned its right to receive the 35% to the City and RDA, it had no right to that tax increment. Ten-Ninety argues that is incorrect, because Ten-Ninety assigned only a *security interest* in the tax increment, an assertedly critical distinction because Ten-Ninety's ownership of 100 percent of tax increment and payment of the Settlement Payments from Ten-Ninety's own funds is assertedly a critical component of its protection under the Settlement against future reductions in tax increment. Ten-Ninety argues DOF offered no evidence, but just speculation that Ten-Ninety did not really need security, supported by DOF's "freely-offered opinion that any claims against Ten-Ninety would be too stale to prosecute anyway."

We have explained that Ten-Ninety's view of the OPA/FA fails. And we reject Ten-Ninety's appellate argument, unsupported by citation to evidence or authority, that severance will "cut off tax increment payments that are relied upon by the elderly widows of Ten-Ninety's principals."

While this appeal was pending, we published an opinion in December 2017 that the California Supreme Court later declined to review on its own motion but ordered depublished such that it lacks precedential value -- *City of Anaheim v. Cohen* (2017) 227 Cal.Rptr.3d 210, formerly published at 18 Cal.App.5th 758 (S247107, ordered not to

be officially published). (Cal. Rules of Court, rules 8.1105(e)(2), 8.1115.) *Anaheim* held that the Dissolution Law's statutory invalidation of a "Funding Agreement" between a redevelopment agency and its sponsoring city unconstitutionally impaired a private developer's contractual rights under a "Revitalization Agreement" with the city's housing authority, because invalidation of the Funding Agreement destroyed the funding mechanism that in large part made the Revitalization Agreement possible. (*Id.* 227 Cal.Rptr.3d at pp. 231-235.) No such problem exists in this case.

Instead, our analysis requires inquiry into the nature and extent of any contractual obligation, and the scope of the Legislature's power to modify any such obligation. (*Cuenca, supra*, 8 Cal.App.5th at p. 228.) We ask (1) whether a valid contractual relationship exists that relates to the matter that is the subject of the law at issue; (2) whether the law operates to substantially impair that contractual relationship; (3) whether, in the case of impairment, there is a significant and legitimate public purpose behind the law; and (4) whether the law is a reasonable and necessary means to achieve that purpose. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 553-555; see also, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411-412 [74 L.Ed.2d 569].)

In *Galt, supra*, 12 Cal.App.5th 367, we found no unconstitutional impairment of contract. *Galt* argued that disallowing use of tax allocation bond proceeds to fund projects pursuant to a cooperation agreement with *Galt's* former RDA unconstitutionally impaired contractual obligations of bondholders. (*Id.* at p. 378.) We said that, if *Galt* was claiming impairment of its own constitutional rights, it had no standing because a municipality may not complain that the state is impairing its contract. (*Ibid.*) If, on the other hand, *Galt* was attempting to assert the bondholders' rights, then *Galt* had no standing to assert the rights of others. (*Ibid.*) In any event, *Galt* made no attempt to show that bondholders would not be paid under the terms of the bonds and, because the former RDA had no contractual obligation to the bondholders to use the bond proceeds to fund

the projects under the cooperation agreement, DOF did not impair those contracts (the bond agreements) when it determined that the bond proceeds could not be used to fund those projects. (*Id.* at pp. 378, 379.)

Here, there is no impairment of the private party's contractual rights. Ten-Ninety never touched or asserted control over that 35% and now says it did not expect to get that money back. Those monies went directly from the Fiscal Agent, who represented everyone, to the City and the RDA/SA. In exchange for these "settlement payments" by Ten-Ninety, the City in the OPA agreed it had been compensated for all "negative fiscal consequences" related to the development, including any known illegal conduct by Ten-Ninety, yet investigation revealed insufficient evidence of such misconduct, yet Ten-Ninety remained liable for unknown illegal conduct, yet Ten-Ninety would pay all defense costs in the event of any claim based on its negligent or intentional misconduct, yet Ten-Ninety would then recover its legal expenses as "development costs." Yet the attorney who negotiated the Third Amended OPA for the City/RDA admitted the 35% monies would be used for future ongoing operation of other government services (police, fire, etc.) as opposed to reimbursement of the developer's development costs.

The 35% provisions were clearly a contrivance and represented money to which Ten-Ninety was never really entitled, despite the characterization of those monies as development costs. Looking to the substance rather than the form and the admission in the declaration of the attorney who negotiated the 1992 OPA for the City, those monies were not really to reimburse development costs; they were for future ongoing operation of other government services (police, fire, etc.).

There is no impairment of contract.

Even if we found an impairment, it does not exceed constitutional bounds. (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 22-26 [52 L.Ed.2d 92].) Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its

adoption. (*Id.* at p. 22.) The extent of impairment is a relevant factor in determining reasonableness. (*Id.* at pp. 22-23.) Federal authority places the justification for impairment of a contractual *funding* obligation under the light of strict scrutiny. (*California Teacher's Assn. v. Cory* (1984) 155 Cal.App.3d 494, 511, citing *United States Trust*.) In such cases, complete deference to a legislative assessment of reasonableness is not appropriate because the State's *self-interest* is at stake, and a governmental entity can always find a use for extra money. Thus, a legislative purpose simply to expend money for a purpose deemed a better expenditure is not a permissible justification. (*California Teacher's Assn.*, at p. 511, citing *United States Trust*.)

We conclude all the 35% provisions are unenforceable under the Dissolution Law and those funds are to be distributed instead to other local taxing agencies pursuant to the Dissolution Law. (§ 34183, subd. (a)(4).) Ten-Ninety will get an amount equal to 65 percent of tax revenues, as agreed. There will be no payment of 35% from Ten-Ninety to the City and SA, and no repayment to Ten-Ninety. We see no reason to order, as DOF suggests, that the SA should continue to have RPTTF-backed debt equivalent to the 35% funds added onto the balance owed to Ten-Ninety, though it will never be paid.

Although we reverse the judgment insofar as the judgment concludes the OPA is not an unenforceable sponsor agreement, we affirm the judgment insofar as it rules that the SA's "payment obligations to Ten-Ninety under the OPA will terminate at the close of Fiscal Year 2032-2033." In the face of the trial court's observation that certain contract provisions hint at continuation after that date, neither the City, SA, nor Ten-Ninety objected in the trial court or on appeal, to the court's inclusion in the judgment that the contract will end at that date.

As indicated, DOF does not seek to recover any previous payments to Ten-Ninety, the City, or the RDA/SA. DOF seeks only prospective relief in this litigation. Per the scope of issues presented by DOF in these consolidated appeals, our holding is prospective, beginning with the DOF determinations at issue in this litigation.

DISPOSITION

The joint judgment is affirmed insofar as it terminates SA's payment obligations to Ten-Ninety at the close of Fiscal Year 2032-2033. The judgment is otherwise reversed. The matter is remanded to the trial court with directions to vacate the writ of mandate and enter a new judgment in favor of the Department of Finance and against the City, SA, and Ten-Ninety. DOF's Director is awarded costs on appeal. (Cal. Rules of Court, rule 8.278.)

_____HULL_____, Acting P. J.

We concur:

_____MAURO_____, J.

_____HOCH_____, J.